Supreme Court, U.S.
FILED
DEC 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 89-610 and 89-758

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

v.

DEPARTMENT OF THE TREASURY,
OFFICE OF CHIEF COUNSEL

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

DEPARTMENT OF THE TREASURY,
OFFICE OF CHIEF COUNSEL

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal agency is required by Title VII of the Civil Service Reform Act to negotiate over a union proposal to subject to outside arbitration adverse personnel actions taken against nonpreference eligible employees in the excepted service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 873 F.2d 1467.[1] The opinion of the Federal Labor Relations Authority (Pet. App. 17a) is reported at 30 F.L.R.A. 656.

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[1] "Pet. App." refers to the appendix to the petition filed by the National Treasury Employees Union.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1989. Petitions for rehearing were denied on July 17, 1989. Pet. App. 13a, 16a. The petitions for a writ of certiorari were filed on October 16, 1989 (No. 89-610) and November 14, 1989 (No. 89-758). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Title VII of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 7101 *et seq.* (also known as the Federal Service Labor-Management Relations Statute), federal employees have the right to bargain collectively over their "conditions of employment" (5 U.S.C. 7102(2)). That term is defined to include "personnel policies, practices, and matters * * * affecting working conditions" except "to the extent such matters are specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14). The duty to bargain does not extend to proposals that interfere with certain rights reserved to agency management, including management's right "in accordance with applicable laws * * * to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees." 5 U.S.C. 7106(a)(2)(A). And under a further provision, agencies are not required to bargain over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. 7117(a)(1).

2. Also in the CSRA, Congress comprehensively revised the statutory provisions governing personnel procedures of federal agencies, and in doing so carefully delineated the rights of federal employees to challenge agency personnel action. Chapter 43 of the CSRA, 5 U.S.C. 4301 *et seq.*, which requires agencies to evaluate the job performance of federal workers, empowers an agency to remove an employee who is performing unsatisfactorily or to reduce his or her grade. That chapter includes within its

definition of "employee" all personnel in the competitive service (including probationary employees) as well as personnel in the excepted service.[2] Under the chapter, all employees are entitled to minimal procedural protections if they are subject to major adverse actions such as removals or reductions in grade. Those rights include (1) notice of the adverse action, (2) representation by an attorney, and (3) a reasonable time to answer orally and in writing. See 5 U.S.C. 4303(b). Additionally, Chapter 43 provides that employees in the competitive service and preference eligibles[3] may appeal a removal or reduction in grade to the Merit Service Protection Board (MSPB). 5 U.S.C. 4303(e). But Chapter 43 does not provide that remedy to probationary employees or to excepted service employees who are not preference eligibles.

Chapter 75 governs adverse personnel actions, including removals, suspensions, and reductions in grade or pay, other than performance-based actions taken under Chapter 43. Under Chapter 75, an employee is defined to include only competitive service employees and, for some purposes, preference eligibles in the excepted service. 5 U.S.C. 7511(a)(1). As to major adverse personnel actions, Chapter 75 provides that these employees may appeal such actions to the MSPB. 5 U.S.C. 7513(d). Other employees, including most employees in the excepted service and probationary employees, have no right to obtain review of

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[2] The excepted service consists of those civil service positions that are in neither the competitive service nor the Senior Executive Service. 5 U.S.C. 2103(a).

[3] As defined at 5 U.S.C. 2108, a "preference eligible" employee is one who served in the United States armed forces during a war and received an honorable discharge. The category also includes wives and mothers of some disabled or deceased veterans. See 5 U.S.C. 2108(1). The Veterans Preference Act granted special rights to these persons, and the CSRA preserved those preferences.

adverse actions under Chapter 75 outside their employing agency. But Congress has authorized the Office of Personnel Management (OPM) to provide for the application of Chapter 75 to personnel in "any position or group of positions excepted from the competitive service." 5 U.S.C. 7511(c). To date, OPM has not done so save for two discrete, narrow exceptions. See 5 C.F.R. 752.401(b)(3); 5 C.F.R. 752.401(b)(4).[4]

3. This case arises out of a dispute regarding the negotiability of a proposal offered by the National Treasury Employees Union (the Union), which represents employees in both excepted service and competitive service positions in the Chief Counsel's Office of the Internal Revenue Service. The Union proposal provided that all employees in the bargaining unit, including employees holding positions in the excepted service who are not preference eligibles, would be covered in the disciplinary article of the contract. Pet. App. 4a, 17a. Under that proposal, excepted service employees would be able to challenge adverse personnel actions through the negotiated grievance procedure, including arbitration, notwithstanding the fact that such employees may not obtain outside administrative or judicial review of such personnel actions under Chapters 43 and 75 of the CSRA. Although the par-

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[4] Finally, under the CSRA, employees in the competitive service and most employees in the excepted service enjoy protection from "prohibited personnel practices," actions that result from discrimination based on race, religion, gender, age, handicapping condition, marital status, political affiliation, or retaliation for exposing government misconduct. 5 U.S.C. 2302. The CSRA obligates the MSPB's Office of Special Counsel to investigate any allegations of prohibited personnel practices, including charges brought to its attention by federal employees. 5 U.S.C. 1206. In an appropriate case, the Office of Special Counsel may request the MSPB to consider ordering corrective action.

ties initially agreed upon the proposal, the Treasury Department disapproved it on review by the head of the agency. See 5 U.S.C. 7114(c)(1). The basis of the disapproval was the agency's determination that the proposal was inconsistent with other federal law, *i.e.*, the provisions in Chapters 43 and 75 of the CSRA that deny to excepted service employees who are not preference eligibles the right to obtain outside review of adverse personnel actions. Pet. App. 4a.[5]

4. On the Union's request for review of this negotiability issue, the Federal Labor Relations Authority (FLRA or Authority) found the proposal to be within the agency's duty to bargain. Pet. App. 17a. In its decision, the Authority adopted the reasoning set forth in its prior decision in *National Treasury Employees Union and Department of Health and Human Services, Region V*, 25 F.L.R.A. 1110 (1987), rev'd *sub nom. United States Department of Health and Human Services* v. *FLRA*, 858 F.2d 1278 (7th Cir. 1988) (*HHS Region V*). There, the Authority found a similar proposal to be negotiable in part because of its belief that the definitions of "employee" and "grievance" under Title VII of the CSRA were expansive enough to cover excepted service employees and grievances concerning major personnel actions. 25 F.L.R.A. at 1114. It also relied on the fact that Congress had not included grievances by non-veteran employees in the excepted service in 5 U.S.C. 7103(a)(14), which lists a number of specific exceptions to the coverage of a negotiated grievance procedure. 25 F.L.R.A. at 1114. The

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[5] The proposal was disapproved to the extent that it applied "the grievance procedure and arbitration to those personnel actions involving excepted service employees and probationary employees, where pursuant to 5 U.S.C. 4303 and 5 U.S.C. 7511, such employees have no right of appeal to the Merit Systems Protection Board." Pet. App. 18a.

Authority also reasoned that, because Congress had provided some measure of protection to all excepted service employees under the CSRA and because Congress had empowered the Office of Personnel Management (OPM) to provide additional protections under Chapter 75 if it saw fit, Congress had not delineated all the protections that such employees could potentially obtain. 25 F.L.R.A. at 1116. Finally, the Authority relied (*ibid.*) on the decision of the Federal Circuit in *Fausto* v. *United States,* 783 F.2d 1020 (1986), a decision later reversed by this Court, 484 U.S. 439 (1988).

5. The court of appeals reversed, holding that because the legislative history and structure of the CSRA show that Congress intended excepted service employees to have no right to arbitral review of adverse actions, the Union's proposal for such review is inconsistent with federal law and nonnegotiable. Pet. App. 1a, 2a.

Like the Seventh Circuit in *HHS Region V,* the court of appeals found that this Court's decision in *United States* v. *Fausto,* 484 U.S. 439 (1988), substantially affected its disposition of this issue. Pet. App. 5a. The court of appeals concluded that permitting excepted service employees to challenge adverse personnel actions in arbitration would conflict with two interrelated structural elements in the CSRA's integrated scheme of administrative and judicial review that this Court identified in *Fausto.* First, permitting such challenges would conflict with the objectives of the CSRA to establish the MSPB as the primary body for resolving disputes over adverse personnel actions and to assign to the Federal Circuit exclusive responsibility for judicial review of decisions involving such challenges. *Id.* at 6a. Under the Union's proposal, arbitrators would not be statutorily bound to follow MSPB and Federal Circuit precedent. *Id.* at 7a-8a.

Second, the court of appeals concluded that the proposal would undermine another objective of the CSRA: granting a preferred position to competitive and preference eligible employees relative to nonpreference eligible excepted service and probationary employees. Pet. App. 6a. Under the proposal, the court reasoned, arbitrators might treat excepted service employees more favorably than competitive service employees. *Id.* at 7a-8a. Likewise, in exercising its authority to review arbitral decisions under the proposal, see 5 U.S.C. 7122, the FLRA could apply a deferential standard of review in contrast to the more thorough review that the Federal Circuit would exercise in reviewing an arbitral award to a competitive service employee.[6] Pet. App. 8a. Finally, the court of appeals noted that the proposal would undermine the role that Congress assigned to OPM to decide whether and how to extend the right of redress to excepted service employees. *Id.* at 10a-11a.

ARGUMENT

The decision of the court of appeals does not warrant review by this Court. The court of appeals carefully and correctly analyzed the interrelationships of a number of provisions in a complex statute governing federal personnel policy and labor relations. Its holding – that the agency was not required to negotiate over the Union's proposal –

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[6] In the case of competitive service (and preference eligible) employees, adverse personnel actions under Chapters 43 and 75 are, in general, subject to judicial review only in the Federal Circuit. See 5 U.S.C. 7703(b). Title VII of the CSRA provides, in essence, that if any such matter is raised under a negotiated grievance procedure as a result of collective bargaining, the judicial review provisions of Section 7703 "shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the [MSPB]." 5 U.S.C. 7121(f).

is fully consistent with the only other appellate decision on this issue. See *HHS Region V, supra.*[7] Furthermore, the decision below is informed by, and consistent with, this Court's decision in *United States* v. *Fausto, supra.* Finally, the decision below does not merit review because Congress is currently considering legislation that would effectively resolve the question presented by affording excepted service employees the right to outside review of adverse personnel actions.

1. In *United States* v. *Fausto, supra,* this Court recognized that Congress passed the CSRA as a comprehensive and exclusive system of remedies "to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century' that was the civil service system." 484 U.S. at 444. The Court especially emphasized the exclusivity of the remedies that the CSRA provides for employees in the excepted service. The Federal Circuit—in a decision relied on by the FLRA in framing the rule at issue here (see 25 F.L.R.A. at 1115-1116)—had reasoned that congressional exclusion of nonpreference members of the excepted service from the definitional sections of Chapter 75 of the CSRA was merely a silence that was uninstructive as to whether Congress wanted generally to limit the remedies available to ex-

[7] The issue presented here is also pending before the Ninth Circuit in *United States Department of Health and Human Services, Region IX* v. *FLRA,* Nos. 88-7192, 88-7236, in which oral argument took place on May 10, 1989. Although the FLRA correctly notes (Pet. 13-14) that a federal agency may invoke the jurisdiction of the District of Columbia Circuit to obtain review of the Authority's decisions, see 5 U.S.C. 7123(a), the statute also provides that the Authority itself "may petition *any* appropriate United States court of appeals" for enforcement of its orders. 5 U.S.C. 7123(b) (emphasis added).

cepted service employees. But this Court rejected that reasoning:

> We view the exclusion quite differently. In the context of the entire statutory scheme, we think it displays a clear congressional intent to deny the excluded employees the protections of Chapter 75 including judicial review—for personnel action covered by that chapter. 484 U.S. at 447.

The Court concluded that the CSRA's failure to provide excepted service employees the right to obtain review of personnel actions under Chapter 75 precluded such review. That failure, the Court explained, was not "an uninformative consequence" of the CSRA's limited scope but instead a "manifestation of a considered congressional judgment" that excepted service employees should not be entitled to obtain review "for adverse action of the type governed by Chapter 75." 484 U.S. at 448-449.

> The comprehensive nature of the CSRA, the attention that it gives throughout to the rights of nonpreference excepted service employees, and the fact that it does not include them in provisions for administrative and judicial review contained in Chapter 75, combine to establish a congressional judgment that those employees should not be able to demand judicial review for the type of personnel action covered by that chapter. *Id.* at 448.

In further support of its holding, the Court relied upon two structural elements that emerge from the CSRA's framework: (1) the preferred position of competitive service employees and preference eligibles under the CSRA, and (2) the primacy of the MSPB for administrative resolution of disputes over adverse personnel actions. 484 U.S. at 449. As to the latter point, the Court explained that permitting excepted service employees to challenge adverse

personnel actions in a manner not provided under Chapters 43 or 75 of the CSRA would countenance the existence of "legally enforceable employment entitlements * * * not subject to the unifying authority, in consistency of fact-finding as well as interpretation of law, of the MSPB." 484 U.S. 451. The Court also noted that determinations of such entitlements would not be subject, as Congress envisioned, to the consistency of interpretation by the Federal Circuit, charged with reviewing MSPB decisions under the CSRA. *Ibid.*[8]

2. Both the court below and the Seventh Circuit concluded that to impose on a federal agency a procedure that includes third-party arbitration of adverse personnel actions against excepted service employees who are not preference eligibles would be inconsistent with federal law because, contrary to the purpose of Chapters 43 and 75, it would subject such actions to outside review.

In doing so, both courts properly relied on this Court's analysis in *Fausto* of the nature of the CSRA. As summarized by the Seventh Circuit in *HHS Region V* (858 F.2d at 1284):

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[8] Although it had relied on the Federal Circuit's decision in *Fausto* in its decision in *HHS Region V*, the FLRA dismissed this Court's reversal of *Fausto* in a single sentence in *National Treasury Employees Union and Department of Transportation and Customs Service*, 31 F.L.R.A. 181 (1988), rev'd in part, 873 F.2d 1473 (D.C. Cir. 1989). In reaching that conclusion, the Authority apparently reasoned that *Fausto* only addressed the right of excepted service employees under the CSRA to obtain *judicial* review of adverse personnel actions and was uninstructive about the right of those employees to obtain arbitral review of such decisions. This argument, which is renewed in the petition (Pet. 19), fails to deal effectively either with this Court's specific reference to the exclusion of "administrative" as well as judicial review (484 U.S. at 443), or with the rationale of the *Fausto* decision as a whole.

> The thrust of the *Fausto* opinion is that the delicate balancing between the needs of efficient agency administration and employment protection that is embodied in this framework would be undermined if nonpreference excepted service employees could contest adverse employment action outside the agency.

Moreover, as the court of appeals noted in this case, implementation of the Union's proposal would mean that excepted service employees could challenge adverse personnel actions in a system in which neither the arbitrator nor the Authority would be bound to apply the precedents of the MSPB and the Federal Circuit. Pet. App. 6a-8a. Thus, it concluded that the proposal would impermissibly conflict with the primacy that Congress intended the MSPB and the Federal Circuit to possess in interpreting the law applicable to such challenges to federal personnel actions.

In attacking this conclusion, petitioners stress that, although competitive service employees and preference eligibles may elect to challenge adverse personnel actions *either* before the MSPB or through arbitration, the proposal gives excepted service employees only the latter option. See, *e.g.*, FLRA Pet. 22-24. Petitioners also claim that employing agencies enjoy certain procedural advantages in challenging arbitral decisions before the Authority that they do not enjoy in challenging adverse MSPB decision before the Federal Circuit. Thus petitioners argue that, in comparison to preference eligible and competitive service employees, excepted service employees are disadvantaged by the fact that under the proposal they are still confined to the latter method of challenging adverse personnel actions.[9]

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[9] The Union (NTEU Pet. 16-18) lists such disadvantages in using the grievance/arbitration process as a more difficult burden of proof for an employee who appeals an adverse decision of an arbitrator to

But these arguments do not undermine the central conclusion reached by the court below and by the Seventh Circuit. The heart of that conclusion is that, under the CSRA as construed in *Fausto,* Congress contemplated outside review of adverse personnel actions taken under Chapters 43 and 75 *only* for competitive service employees and those excepted service employees who are preference eligibles. Thus, the Union's proposal, in providing outside review for all other excepted service employees, would eliminate an essential distinction that Congress has drawn. Whether the Union's proposal gives those employees the full measure of outside review or only some portion of it is beside the point; either result conflicts with the statute.[10]

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the Authority and the fact that an agency may seek review by the Authority of an adverse arbitral decision but cannot appeal from an adverse decision by the MSPB. Such procedural disparties would only occur, however, because of the larger anomaly the proposal would create. While challenges to adverse actions by excepted service employees in a union would be appealable to the Authority, all other challenges by employees in the main civil service system would be ultimately appealable to the Federal Circuit. Congress plainly could not have intended to create such an unorthodox plan.

[10] Like the court below, the FLRA assumes that an arbitrator's decision with respect to an adverse action taken against an excepted service employee would be subject to review by the FLRA under Section 7122. So do we. However, Section 7121(f) provides that "matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section" are appealable to the Federal Circuit. Since Section 7121(f) refers to "matters" and not to classes of employees, it is also possible to construe it to refer only to the types of adverse actions listed in Sections 4303 and 7512. Under that interpretation, any federal employee (including a nonpreference eligible excepted service employee) who is covered by a negotiated grievance provision and is subjected to a major adverse action would be able to appeal the arbitrator's decision to the Federal Circuit. Such a result would be directly contrary to Congress's determination, reflected in this Court's deci-

Petitioners also claim that because Congress did not exclude excepted service employees from the broad definitions of "employee" and "grievance" in Title VII of the CSRA, see 5 U.S.C. 7103(a)(2) and (a)(9), it must have intended to permit excepted service employees to grieve adverse actions. The court below (like the Seventh Circuit in *HHS Region V*) rejected this argument, concluding that "determination of negotiability issues cannot be resolved by mere reference to the broad definitional provisions in the statute." Pet. App. 10a n.6, quoting *Department of Justice* v. *FLRA*, 709 F.2d 724, 729 n.22 (D.C. Cir. 1983). In elevating those general definitions above Congress's purpose to deny to excepted service employees the right to secure outside review of adverse personnel actions, petitioners ignore Congress's determination that excepted service employees should not have a statutory entitlement to review of "adverse action of the type governed by Chapter 75 of the CSRA." *Fausto*, 484 U.S. at 449. Indeed, in the *Department of Justice* case, which dealt with the arbitrability of adverse actions against probationary employees, the Authority made the same argument under 5 U.S.C. 7103(a)(2) and (a)(9) that it is making in this case. The argument failed there and remains unpersuasive.[11]

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sion in *Fausto*, that such employees not be permitted to obtain judicial review of adverse actions.

[11] Elsewhere, the Authority argues (Pet. 17-18) that because Congress contemplated that employees in specialized personnel systems might utilize a negotiated grievance procedure even though they did not possess a right to appeal adverse personnel actions to the MSPB, that fact shows that Congress had no intention to preclude excepted service employees from challenging adverse personnel actions through arbitration. See 5 U.S.C. 7121(e)(1). The Authority did not rely on this provision in its decision in this case or in its earlier decision in *HHS Region V*. In any event, because the employees the Union represents are covered by the main civil service system, the provisions

3. Finally, the decision below does not merit review by this Court because Congress is currently considering legislation that would afford excepted service employees the right to outside review of adverse personnel actions.[12] Enactment of that legislation, which has been passed by the House of Representatives, would give excepted service employees the right to appeal adverse personnel actions to the MSPB. By permitting excepted service employees to secure such outside review, enactment of the bill would change substantially the provisions of the CSRA that bear upon the negotiability of proposals like the Union's proposal here.

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relating to specialized personnel systems simply do not apply to them. Based upon that fact, the court below correctly rejected this argument. Pet. App. 12a.

[12] H.R. 3086, 101st Cong., 1st Sess., a bill to grant appeal rights to excepted service employees affected by adverse personnel actions, was introduced on August 2, 1989. On November 3, 1989, the House Committee on Post Office and Civil Service reported the bill with amendments. On November 6, 1989, the House of Representatives passed the bill as reported by the Committee. The Senate received the bill on November 7, 1989, and it has been referred to the Senate Committee on Governmental Affairs.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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DECEMBER 1989

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* The Solicitor General is disqualified in this case.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00682